No. 232.

Brief of Davenport for Appellants

Filed Nov. 9. 1899.

Supreme Court of the United States,

OCTOBER TERM, 1898.

WILLIAM J. CRUICKSHANK, MONTAGUE HOPE ROWE HARRIS, RUSSELL BLEECKER, AND MARK BAGGALLEY, APPELLANTS,
vs.
GEORGE R. BIDWELL.

No. ~~210~~ 232

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

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In the Supreme Court of the United States,

OCTOBER TERM, 1898.

WILLIAM J. CRUICKSHANK and others, Complainants-Appellants, vs. GEORGE R. BIDWELL, Defendant-Appellee.	No. 740.

BRIEF FOR APPELLANTS.

This is an appeal from the decree of the Circuit Court of the United States for the Southern District of New York, sustaining the appellee's general demurrer to the complainants' bill in equity, and dismissing the bill.

The decree is alleged to be erroneous in refusing to hold that, the act under which the Collector claims authority being void for unconstitutionality, his acts complained of in the bill give an equity entitling the complainants to relief by injunction.

THE QUESTION.

The question raised is the constitutionality of the Act of Congress, approved March 2, 1897, entitled "An Act to prevent the importation of impure and unwholesome tea." The points of unconstitutionality claimed are:

1st. That the act in letter and intent delegates the power of Congress to regulate commerce in teas by legislation, to the Secretary of the Treasury.

2d. That it authorizes the taking of the appellants' property and the interfering with his right to import without due process of law.

THE STATUTE.

The Act is printed in full as an appendix to this brief. The portions rendering it obnoxious to the charge of unconstitutionality are, briefly, as follows:

> SEC. 1, prohibits the importation of any merchandise described as tea "inferior in purity, quality and fitness for consumption to the standards provided in Section 3 of the act."
>
> SEC. 2, provides for the appointment by the Secretary of the Treasury of a board of seven experts in teas, to serve for one year, and to be subject to removal by the Secretary, who "shall prepare and submit to him standard samples of tea."

SEC. 3, provides that the Secretary, upon the recommendation of the said Board, "*shall fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of teas imported into the United States, and shall deposit in the Custom House duplicate samples of such standards*" It provides also that he shall furnish duplicate samples of the standards to the importers and dealers in tea, and says, "all teas or merchandise described as tea of inferior purity, quality and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof."

Sections 4, 5 and 6 provide for the comparison of samples of the import with the samples of the standards for their admission, if found by the Examiner to be equal in purity, quality and fitness for consumption to the standards, and for their exclusion if, in the opinion of the Examiner, they are found to be inferior in purity, quality and fitness for consumption to the said standards.

On the protest of either the Collector or the importer, the Examiner's decision is to be referred to a board of three United States General Appraisers, to be designated by the Secretary of the Treasury, and after due examination by them, their decision as to its equality or inferiority to the standards in the above respects shall finally admit or exclude the tea. If excluded, the importer must either give a bond to export it and forthwith export it, or the Collector must destroy it at the expiration of six months.

Section 7 providss that on the examination by the Examiner or boards of United States General Appraisers, the "purity, quality and fitness for consumption" of the same shall be tested according to the usages and customs of the tea trade, including testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

Section 8 provides for the transmission by the Examiner, in the case of protest, of samples to the Board of Appraisers and for the furnishing to the importer a copy of their decision or finding. (It does not require them to state whether the tea is rejected for inferiority in all three respects, or in any single respect.) The appraisers are authorized to obtain the advice, if necessary, of persons "skilled in the examination of teas."

Section 9 provides that no condemned teas after being condemned and exported can be reimported.

Section 10 provides that the Secretary of the Treasury shall have the power to enforce the provisions of this act by proper regulations.

Section 12 repeals the prior Tea Act of 1883.

STATEMENT.

The bill of complaint is for an injunction to restrain the appellee from detaining the appellants' teas now in his possession, and from interfering with, and threatening to interfere with, future importations of teas by the appellants. The intention of the action is to save not only these teas, but com-

plainants' right of liberty to import, as in *Scott* v. *McDonald*, cited under Point 1.

The material facts alleged in the bill, and admitted by the general demurrer, are:

That the defendant is the Collector of Customs of the United States for the Port of New York, and complainants are engaged in the business of importing teas from Japan into the United States, and in November, 1897, imported into the United States and entered at the Custom House several invoices of teas: that the defendant, as Collector, holds said teas and refuses to release the same, pretending that he is authorized thereto by the provisions of the act of Congress, approved March 2, 1897, an entitled "An Act to prevent the importation of impure and unwholesome tea," because, under said act, samples of said teas have been taken by examiners appointed under the authority of the said act, compared with samples set up by the Secretary of the Treasury as standards, and found to be inferior in some or all of the respects designated in the Act of Congress either as to purity, quality or fitness for consumption; that the defendant claims the right to retain the teas for the period of six months, and thereupon to cause the same to be destroyed unless the complainants will give security to forthwith export the teas and permit the invoices and various papers relating to the teas to be marked as "teas condemned under the laws of the United States"; that the defendant's claim, that the teas cannot be lawfully taken from the warehouses, renders them

unsalable and worthless in the market by putting them under a cloud or threat of illegality; that the complainants propose and intend to import other invoices of teas, and the defendant threatens and intends to deal with them in the same manner as those he now holds; that the complainants have complied with the requirements of the law as to the entry of the teas in the Custom House, and there is no further act required by law to entitle them to take possesssion of and dispose of the same.

The bill then disclaims setting up as ground for denying the defendant's right to hold the teas any defect or omission or irregularity in the proceedings of the examiners or appraisers for the condemnation of the tea, confining its ground for equity solely to the unconstitutionality and voidness of the act of March 2, 1897.

The remedy sought is an injunction against the interference by the Collector with the teas imported and those to be imported in future.

The preliminary injunction was denied by Judge Lacombe and the demurrer was sustained by Judge Coxe, following the construction of the law as given in Judge Lacombe's opinion.

ARGUMENT.

I.

Jurisdiction of the Circuit Court.

The fact that the defendant is a United States Customs officer does not prevent the Circuit Court from taking cognizance of an action to enjoin acts

illegal because of the unconstitutionality and voidness of the statute.

Noble *v.* Union River L. R. R. Co., 147 U. S. 165.
U. S. *v.* Lee, 106 U. S., 173.
Kirwin *v.* Murphy, 49 U. S. App., 659.

> "Courts of Justice are established not only to decide upon the controverted rights of citizens as against each other, but also upon rights in controversy between them and the government."

If we cannot have this remedy we are without remedy and are deprived of due process of law. We have no remedy by mandamus to compel him to release the teas because a United States officer cannot be mandamused to do even a ministerial act, by the Circuit Courts. This is on the ground not that the Constitution throws the ægis of sovereignty over him, but simply because Congress, in the Judiciary Act, has withheld this writ from the Circuit Court (Kendall *v.* U. S., 12 Peters, 522).

Even if there were a remedy at law, as in U. S. *v.* Lee, it has been held by this Court that such remedy is not adequate for this case, and that an injunction, in analogous cases, was proper.

Scott *v.* McDonald, 165 U. S., 107.

This Court held in the last cited case that an injunction restraining the officers of the State of South Carolina from interfering with imported liquors, and

also from threatening to interfere with the importation of liquors into that State under an act void for unconstitutionality, was proper, and that there was no adequate remedy at law, saying:

> "Nor can it reasonably be claimed that the plaintiff must postpone his application to the Circuit Court as a court of equity until his property to an amount exceeding in value $2,000 has been actually seized and confiscated, when preventive remedy by injunction would be of no avail."

The only difference between this case and Scott *v.* McDonald is, that the individual to be enjoined is a United States officer.

As there is no question about the competency of United States Circuit Courts to issue injunctions in all cases, and as it may be considered settled by U. S. *v.* Lee that the sovereignty of the United States is no ground for objecting to an action against individuals claiming as United States officers, it would seem to follow that the remedy by injunction is proper and within the cognizance of the Circuit Court.

Mississippi v. *The President* (4 Wallace, 475) has no application to the present action.

The Court said of the duty, the performance of which the State of Mississippi sought to enjoin:

> "The duty thus imposed on the President is in no sense ministerial; it is purely executive and political."

The injunction sought in Mississippi *v.* The President was the restraint of a Department. The Court say:

> "Congress is the legislative department of the Government; the President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are in proper cases subject to its cognizance."

In this case we are not seeking to restrain the Executive Department as represented by the Secretary of the Treasury. He has performed his whole duty in executing the statute, namely, in fixing standards and appointing examiners.

The reasons for refusing to entertain a bill against the President do not exist in any sense as to a bill to restrain a purely ministerial act on the part of a collector.

We now divide our argument into two parts: Delegation of legislative powers, and Right to due process of law.

PART I.

Unconstitutional delegation of legislative power.

II.

The power vested in the Secretary to establish the standards of purity, quality and fitness for consumption which shall control the exclusion or admission of all teas is strictly legislative, and therefore unconstitutional.

Field *v.* Clark, 143 U. S., 649.

The test or rule, as approved by this Court in that case, is stated as follows:

> "The true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In this statute both of these classes of authority are seen in striking contrast.

In Section 3 the "Power to say what the law shall be"—by fixing standards.

In Section 10, "Discretion as to its execution"—in the following words: The Secretary of the Treasury shall have power to enforce the provisions of this act by proper regulations.

To test the act by the above rule "we ask what is the provision of the Act as to the teas to be ex-

cluded or admitted?" The only answer possible is, "Such teas only are admissible as are not inferior to standards to be fixed by the Secretary of the Treasury."

Clearly, then, no man can tell what the law is to be until there are standards and there cannot be any until the Secretary has acted. And no man can tell from day to day what it will be to-morrow, for he has unlimited power to change it by changing the standards.

THE RULE WHICH IS TO BE ORIGINATED, AND FROM TIME TO TIME PROMULGATED, BY THE SECRETARY IN HIS STANDARDS, IS THE ONLY AND THE PARAMOUNT RULE CONTEMPLATED BY THE ACT.

There is nothing in the statute to require this rule to be consistent from year to year. The law, as fixed by him in '97, may be to exclude all except teas of high standard, and, in '98, to admit all except the lowest standard. He can change the law governing any particular tea, at any time, by changing the standard. As a consequence, the character of tea lawful to be imported when shipped may be in the meantime illegal when it arrives. The power given is sufficient to enact laws which would control the supply and demand from time to time. Thus it appears he has power to enact, alter, modify and repeal from time to time in his unlimited discretion the rule which regulates commerce in teas.

If we would treat this power to fix standards as a regulation to enforce a provision of a statute, we must look to the statute for the provision to be enforced, and there is no such provision in the law.

The establishment of standards is not like the duty of the President under the reciprocity laws, the ascertainment of a fact or state of facts upon which the operation of a rule contained in the statute depends. The thing to be fixed by the standards is a policy, not a fact; that is, encouragement of trade in tea made by raising or lowering the degree of comparative purity, the degree of comparative fitness for consumption, and the quality absolutely.

III.

The plain intent of the language used in the act, as well as its actual effect, is to give the Secretary of the Treasury unrestricted power to originate, alter, repeal and re-enact the rule governing commerce in tea.

This appears from a consideration of the language of the act.

FIRST.—*The obvious and ordinary intent of the words used.*

SECOND.—*The intent of Congress as manifested by the previous legislation of which this is an emendation.*

THIRD.—*By the report of the Senate Committee upon which this bill was adopted.*

FIRST.—*The plain and obvious intent of the language used.*

The dictionary meaning of a standard is a measure or rule of quantity or quality.

The things to be measured by the standard are purity, quality and fitness for consumption. The requirement of a standard or measure implies that each of these characteristics is comparative and a matter of degree.

Purity.—It is, therefore, only reasonable to conclude that Congress used purity as applied to teas in a comparative sense.

In support of this, we take the liberty of quoting the language of the counsel for the Government in his printed brief in Buttfield *vs.* Bidwell.

"The establishment of a standard of purity and unwholesomeness implies the assumption that some degree of impurity and unwholesomeness is necessary."

The language which would exclude discretion would be to require him to select samples of *pure* teas as standards; but he is authorized to make "standards of purity." Purity, therefore, is not itself the standard exemplified by the Secretary's sample, but his standard is the exemplification of the degree of purity he sees fit to require. The word purity admits of this, for we speak of degrees of purity in water, knowing that no natural spring water is absolutely pure. The subjoined

quotations from the Report of the Senate Committee will confirm this:

Fitness for consumption: The same reasoning applies to this term also. Unless the words absolutely forbid it, we must assume that Congress knew that there were different degrees of fitness for consumption. It cannot be said that the term "fitness for consumption" does not admit of degrees. Steel rails have more fitness for consumption than iron rails. It well may be that a tea two years old is not so well fitted for consumption as one of this year's crop.

Further, the language of the statute is not that all impure and unwholesome teas only are to be excluded, but only such teas as are inferior in those and other respects to the standards fixed by the Secretary. Indeed, the law forbids the examiner or the appraisers to reverse the Secretary's discretion and admit an invoice of tea if it be strictly pure and fit for consumption, if it is inferior to the standard of the Secretary.

Quality: The word "quality" is more manifestly amenable to this reasoning than the other two.

The dictionary definitions are:

> Webster: "The condition of being of such and such a sort as distinguished from others; nature or character relatively considered, as of goods; character; sort; rank."

Worcester: "The nature of a thing relatively considered; property of a thing; attribute."

The Century: Degree of excellence or fineness; grade, as, the food was of inferior quality; the finest quality of clothing."

All of which justifies fully the language of Mr. Whitney, the learned counsel for the Government, in his printed brief in the case of Buttfield *v.* Bidwell, where he says:

> "The term 'quality' is a very familiar one in the English language. It is not synonymous with wholesomeness. It does not represent hygienic qualities. It represents the attributes of an article in their widest scope. *No broader jurisdiction could be given over any article than by giving power to regulate its quality.*"

The relation of the word "quality" is shown in an official publication of the U S. Agricultural Department, 1892, on Food and Food Adulteration, part 7, page 898.

The analytical and other work in connection with this report indicates that there are few, if any, spurious teas on the market. The range *in quality* is undoubtedly very great, many samples deserving to be termed "tea" simply because they are composed of the leaves of the *Thea*, and not through the many pleasant qualities which we usually associate with the beverage of this name.

With the strict enforcement of the United States adulteration act, the consumer is reasonably well protected, so far as securing the genuine leaf is concerned, *but, of course, has no protection from the sale of inferior teas.*

This Act of 1897 is a substitute for the Act of 1883. The Act of 1883 withheld discretion, and specified positively the causes for which tea was to be excluded. The Act of 1897 eliminates that specification and substitutes instead "standards be established by the Secretary of the Treasury."

The first section of the Act of 1883 is in the same words as the first section of this act, except that in place of the words in '97 "*inferior in purity, quality, and fitness for consumption to the standards provided in section three*" the act of '83 excluded only teas "*adulterated with spurious leaf or with exhausted leaves, or which contain so great an admixture of chemicals or other deleterious substances as to make it unfit for use.*"

In 1883 the Examiner was to decide whether or not a specific invoice of tea answered the above specified description which constituted the standard. In 1897 the Examiner is to decide whether or not the tea was above or below a standard not specified in the law, but left it to the Board of Experts under the Secretary of the Treasury to specify them.

Our argument is, that the withdrawal of the rule or standard given in the Act of 1883 emphasizes the evident intent to give the Secretary of the Treasury the legislative power which Congress itself exercised in giving that standard in 1883.

Again, it further appears from the consideration that there was no necessity, unless this illegal dis-

cretion was aimed at, to pass a law to enable the Secretary of the Treasury to furnish examiners samples to aid them in ascertaining the absolute character of the tea. Both of the acts give him power to enforce their provisions by appropriate regulations, and anything not discretionary could be done under this.

Again, the Act of 1883 discloses to us what is intended by "pure" teas. It is, tea "not adulterated with any spurious leaf or with exhausted leaves."

Clearly, therefore, the reason for allowing the Secretary to fix a standard was to leave it to his discretion as to how much adulterated or spurious leaf might be introduced, and this is confirmed by the Report of the Senate Committee on Commerce.

Again, in the Act of 1883 "unfitness for use" is limited to such unfitness only as is occasioned by containing so great a "mixture of chemicals or other deleterious substances as to make it unfit for use."

This, which is clearly a hygienic standard also, is withdrawn, and the whole field of unfitness for use, both as to reasons and also as to degree, is withdrawn from the statute and committed to the Secretary's discretion.

The numerous sanitary inspection laws stand in sharp contrast with this—in that, like the Tea Law of 1883, they give a rule and do not leave the rule to an administrative officer. For example—the Food Act.

THIRD.—*The intent to give legislative discretion is shown in the report of the Senate Committee on Commerce, on which this bill was adopted.*

54th Congress, Second Session; Senate. Report No. 1527, February 23, 1897.

We cite this on authority of Amer. N. & T. C. *v.* Worthington, 141 U. S., 468).

On the question of purity as deemed for fitness for consumption, they say:

> "As many teas fit for use may have some quality of adulterated or exhausted leaf, it is impossible to determine exactly where the line should be drawn. Consequently some importer is always suffering injustice by having his teas rejected which are fully equal to another's whose teas are admitted."

The Act of 1883 forbade *any* adulterated or exhausted leaves. The intent of this act is to admit teas having some quantity of adulterated or exhausted leaf, and to give the Secretary power and discretion as to the degree. Clearly, comparative purity with discretion as to degree is what was contemplated by this act.

Again, as to fitness for consumption, they say:

> "The inspectors having no guide as to what constitutes tea unfit for use, were obliged to decide according to their own impressions of the moment, necessarily vague, which resulted in the shutting out of a tea to day which would be admitted to-morrow."

This again illustrates forcibly the evident intent to give the Secretary arbitrary power; for, as expert inspectors found in themselves no definite impression of unfitness for use, which would enable them to judge, the statute authorizes the Secretary of the Treasury to make his impression, whatever it might be, the law, expressing it in a standard.

Again, as to quality, the intent to give an arbitrary discretion is much more evident. They say:

> "Not only the inspectors have no guide or standard by which to judge, but the arbitrators are likewise at sea, left entirely to their own vague impressions, which are constantly varying. It is a well known fact that experts vary in their impressions of values, as proved continually by valuations at public auctions, in which the teas are never valued the same by different brokers, but frequently at 20 per cent. or 30 per cent. variation."

If the above be true, that even experts vary and are left to their impressions, what greater power could be given to the Secretary of the Treasury than to make his impression, expressed in a standard, the law?

The foregoing suggests also other questions. For example, if several experts in teas cannot agree within twenty or thirty per cent. as to their grade, how is the Secretary to establish a standard not purely discretionary and arbitrary. Or, are examiners, in comparing an import with the "standard," to

say whether it is twenty or thirty per cent. above or below it? It must be therefore governed, not by a law, but by the arbitrary authority of the samples set up as standards.

The result of this would be that not only is the Secretary of the Treasury practically left liberty to establish a standard, as to which there being no guide in the words of the law, purity, quality and fitness for consumption, he cannot be sure of the grade he dictates, and our teas are excluded when it is not practical to say within twenty or thirty per cent. whether they are above or below standard.

The report goes on to propose a remedy which Congress has emphatically not adopted. It was this: To make it the duty of the board of experts "to determine *the lowest grade of tea fit for use;* purchase enough for a standard, say five packages of each kind," and make these the standard samples. If we prove the act had given the Secretary, as the law, to be exemplified in his samples, the lowest grade fit for use, it would perhaps not be so far over the constitutional limit; but it absolutely refrains from imposing any such limitation upon him and leaves him, first, to choose whether he will take a high or a low grade, and then to get samples of it.

Thus it appears that the law has taken away the rule fixed by the Act of 1883 on the one hand, and failed to prescribe a rule of the lowest grade, or any restriction upon the grade to be selected, from

which we argue that the intent of the law is that which appears from its obvious language, to wit, to give absolute discretion, unlimited by position, wholesomeness or purity, or absolute unfitness for use, or any restriction upon high or low grade, from year to year, to say what the law is to be.

IV.

The title of the act cannot be used to extend or restrain any positive provision contained in the body of the act.

U. S. *v.* Oregon & Cal. R. R. Co., 164 U. S., 526.

Hadden *v.* the Collector, 5 Wall., 107.

> "It is only when the meaning of the act is doubtful that resort may be had to the title, and even then it has little weight."

There is no ambiguity in the act proper. The fact that the power to fix standards of purity, quality and fitness for consumption gives discretion as to degree, is not ambiguity.

The word "quality" is not in the title. It is apparent that the omission of a word from the title does not furnish ground to use the title for denying that word all force.

V.

Cases decided under this act. See Point IX.

Cruikshank v. *Bidwell.*

This is the decision of Judge Lacombe in this case, denying the motion for a preliminary injunction, following which the demurrer was sustained.

The opinion is part of the record, at page 7. It is based on the decisions of this Court upon the alien exclusion acts.

The questions decided in the alien exclusion cases have no analogy to the questions in this case.

Those acts confer nothing but a judicial function on the Secretary of the Treasury, and do not raise the question of delegation.

As to due process of law, the alien laws are laws prescribing the limitations under which, to an alien who has no right to enter, a right is to be accorded.

This act is a law authorizing the restriction of the citizen's right to liberty to import. As to both laws, the power to legislate cannot be delegated. As to the alien act, as it accords him a right and does not deny any right, the question of due process does not arise. The distinction between the statutes is more fully discussed under Point IX., denial of due process.

The learned Judge also uses the words "power to decide finally whether an alien has or has not sufficient property to enter" as if they were in the statute. The words of the statute are, "such aliens as are likely to become a public charge."

But the alien acts do not give the Secretary of the Treasury power "to decide finally *whether an alien has or has not sufficient property to be allowed to en-*

ter." The authority upon which the Secretary acts is expressed in the alien acts to be, "to exclude such aliens as are likely to become a public charge." Of course, the amount of property which an alien has would be an element in reaching the conclusion whether he was "likely to become a public charge"; but, certainly, the duty to decide whether he is "likely to become a public charge" cannot be construed to give the Secretary authority to fix a standard of the amount of property which an alien must have in order to enter.

This would be an attempt to limit the law similar to that disapproved of in

Morrill *v.* Jones, 106 U. S., 267.

An act requiring the Secretary to admit free of duty all animals imported for breeding purposes did not authorize him to make a regulation that only animals which could be called fancy stock should be admitted.

Power to arbitrarily fix the amount of property required would be legislative.

Buttfield v. *Bidwell*, U. S. Circuit Court of Appeals, Second Circuit:

The question discussed in this case was the force of the words "purity, quality, and fitness for consumption." The question of constitutionality, of course, could not be discussed, the Court of Appeals having no jurisdiction.

The plaintiff's teas had been rejected because, ad-

mitting them to be pure and fit for consumption, they were found not equal in "quality." He contended that the act could be sustained only as a health act relating to wholesomeness, and that the word "quality" was to be interpreted to mean nothing else but purity and fitness for consumption, as indicating wholesomeness. Upon which the Court say:

> "The argument for the complainant, in effect, requires the word 'quality,' whenever used in the Act of Congress, to be eliminated, or if not eliminated, to be used as a synonym for purity and fitness for consumption. The history of the enactment shows that the word was industriously inserted to make the act a more stringent substitute for the existing legislation. The amendment evinces the intention of the Senate to authorize the adoption of all uniform standards by the Secretary of the Treasury which would be adequate to exclude the lowest grades of teas whether demonstrably of inferior degree of purity or unfit for consumption, or presumably or possibly so, because of their inferior quality."

But the act does not specify—the lowest grades—hence the power to exclude the lowest necessary imports the power to admit only the highest. It is true the "lowest" may have been in the mind of the committee, but it is not expressed in the act, and the rule is too familiar to need citation, that not what is done under a law, but the power given, is the test of its constitutionality.

Sang Lung v. *Jackson* (Circuit Court, California, 85 Fed. Rep., 502):

In this case the constitutionality of this act came in question and was upheld.

The Secretary of the Treasury had failed to fix any standards for the kinds of tea which the Collector was excluding. Hence it was impossible for the Collector to get a decision that the tea was below standard.

But it is evident that the law was not carefully considered, on the question of delegation of power, for the matter is disposed of in this way:

> "This was simply one of the means devised by Congress for carrying out its expressed will that no impure or adulterated teas should be admitted into the United States."

But, as we have seen, Congress in repealing the Act of 1883 had disclaimed that purpose and certainly does not express it in this statute.

To the complainant's objection that his teas had not been adjudged inferior to the standard, the reply is (p. 107), in effect, an importer has no more right to import than an alien to enter:

> "We do not think the complainants have any such absolute or vested right to import tea into the United States as would authorize a court of equity to inquire whether the Secretary of the Treasury in establishing standards under the act of March 2, 1897, made any

mistake *of law* or fact;" and he cites the alien exclusion cases.

But they are inapplicable, for the alien can only ask a privilege to enter, where the importer has a right to import, which can be regulated only according to "the law of the land."

VI.

Decisions on the question of delegated legislative authority.

The power to provide standards is the power to legislate.

Dowling *v.* The Ins. Co., 31 L. R. A., 112 (Wisc.)
O'Neill *v.* The Ins. Co., 166 Pa., 71.

The power held unconstitutional in these cases was power to the Commissioner of Insurance to fix a standard form of policy of insurance, and the use of any other was forbidden. The mere fact that the policy must be a policy of insurance was not held to purge the power to fix standards of its legislative character.

Adams *v.* Burdge, 95 Wisc., 390.

A statute was held unconstitutional, for delegation of legislative power, which authorized the State Board of Health to make such rules and regulations, and to take such measures as may, in its judgment, be necessary for the protection of the people of the

State from certain contagious diseases. The Board passed a rule excluding from attending school children who had not been vaccinated.

Chi., M. & St. P. R. R. Co. *v.* Minn., 134 U. S., 418.

This was delegation to a commission of power to fix rates of freight. No question of power of delegation was raised. The power was upheld on the ground of the right reserved to the legislatures to make a franchise subject to the direction of commissioners.

Importers, exercising the right of liberty to import, are not analogous to railroads acting under franchises

Further, in these cases it was held that the making of the Commissioners' decision final, was unconstitutional as delegating and infringing the function of the judiciary.

THE BRIDGE CASES.

U. S. *v.* Keokuk & H. Bridge Co., 45 Fed. Rep., 178.
U. S. *v.* Rider, 50 Fed. Rep. 406.
U. S. *v.* City of Moline, 82 Fed. Rep., 592.

In the first two of the above cases, the courts held that the power to the Secretary of War, to condemn at discretion any railroad bridge "now con-

structed or hereafter to be constructed over navigable waterways as an obstruction to free navigation, by reason of insufficient height, width or span, *or otherwise*," was a delegation of the power to determine how much of an obstruction public interest required should be placed in the way of the free navigation of a river, and that such powers could not be delegated.

In the latter case, U. S. *v.* City of Moline, the Court held that the power to make the determination as to a particular obstruction existing over a waterway under improvement by the United States, was judicial and not legislative, and constitutional, because his decision could only be put in force by appeal to the courts, and was subject to discussion as to reasonableness.

All three decisions agree that he could not be commissioned to fix a standard for the freedom of waterways.

The Reciprocity and Embargo Laws.

Field *v.* Clark, 143 U. S., 649.

The prevailing opinion of the Court was based on the principle that the only duty the President had was to ascertain the existence of a certain state of facts, and his declaration of the same was to put a complete law in operation or to suspend it.

The Court interprets the words "he deems the

state of fact to exist" to mean "when he shall find it to be the fact."

The dissenting opinion held the words "he deems" to mean "in his discretion."

The case rests upon the decision that the facts in question certainly existed, and therefore left him no discretion.

U. S. *v.* Ormsbee, 74 Fed. Rep., 207.

The authority to the Secretary of War to prescribe rules and regulations for the use, administration and navigation of canals owned and operated by the United States as, in his judgment, public necessity may require, was held not legislative.

In this case Congress was simply regulating the use of public property, and not liable to criticism because interfering with the rights of any individual.

VII.

There is no established custom of legislation like that of statutes giving the President reciprocity and embargo powers to justify this act.

The Food Act of the United States provides for proceedings by forfeiture, and does not leave the standard to an administrative officer, but prescribes it, as did the Tea Act of 1883. Other health laws are of a like nature, and usually provide for actions for forfeiture.

VIII.

The constitutionality of the law is to be judged not by what is done, but by what the law authorizes to be done.

Colon *v.* Lisk, 153 N. Y., 188.

This law authorizes the Secretary of the Treasury to fix high or low standards as he sees fit. It cannot be said that if he fixes any other than the lowest possible standards consistent with wholesomeness he would be violating the law.

The most strained construction cannot read anything like this into the statute.

The secretary seems to be limited to such samples as the board of experts furnish him, and also by their recommendation.

The term of the board is one year. It is, of course, a matter of judicial notice that tea is an annual crop. The standards of the crop for one year might, therefore, either by accident, by intent, or by necessity, under the authority of the act, be higher or lower than the standards of the previous year. Consequently, an importer who had shipped an invoice of teas legal under the low standard of the first year, might find them illegal on arrival, under the standards fixed for the second year. This would not result from an abuse of the authority, or be an act unauthorized, but it would be the legitimate exercise of authority under the statute.

Again, assuming the standard of the second year to be lower than the standard of the first year, an importer whose teas were made illegal by the standards and were held for the six months for destruction, would find that his competitor was allowed to import exactly the same teas and have them lawful, judged by the lower standard.

PART TWO.

Unconstitutionality for denial of due process of law.

The denial of due process by this legislation is twofold:

1st. The committal of the final decision as to admission or exclusion of teas to administrative officers, without hearing allowed the importer.

2d. The denial of the right to question the legality of the standards when fixed, is denial of due process.

IX.

The constitutional power of Congress to regulate commerce is to be exercised in accordance with the other constitutional provisions as to due process of law.

> "Due process of law in each particular case means such an exertion of the powers of the Government as the settled maxims of law permit and sanction, and are under such safeguards for the protection of individual rights as those maxims prescribe for the class of

cases to which the one being dealt with belongs."

Cooley on Constitutional Limitations, 536.

We need no more precise definition than this, because all process *on the question whether our property is to be destroyed* is denied us by this statute. Our teas are seized when they enter the country, and the law gives us no hearing of any sort, but simply leaves us to the *ex parte* condemnation of an administrative officer.

The statute in question here is really to compel commerce in the better grades of tea. It is analogous to the oleomargarine act in New York, which was held to be not a police or health or inspection law, though so entitled, but a law to protect the trade in butter from the competition of a cheaper article.

People *v* Marx, 99 N. Y., 377.
Re Jacobs, 98 N. Y., 98.

We contend that denial of process in such cases is not sanctioned by any precedent in decision or legislation or any rule of necessity, police or sanitation.

The doctrine which would accord Congress power to thus deny the importer all rights would seem to be dangerous to the last degree. If it can be done on the question of the quality of teas, it can be done on the question of the quality of any import.

The cases where summary proceedings, without other process of law, are prescribed by the Leg-

islature are only cases where public safety creates a necessity.

Wynehamer *v.* People, 13 N. Y., 389.

These are—

Quarantine laws, as to men and animals:

They appeal to the rule that the public safety is the highest law.

Revenue and Tax laws:

These stand on three exceptional circumstances:

1st. That the collection of customs is vital to the existence of the Government.

2d. That the collection of customs would be impossible through judicial process.

3d. That summary process for collection of customs and debts due Governments was the law of the land and due process before the Constitution.

Murray *v.* Hoboken L. C., 59 U. S., 72.

Another class is Police Laws, such as the destruction of buildings to prevent the spread of conflagration.

This act does not come within any of these classes. It is in no sense a quarantine law, nor a revenue law, nor is there any possibility of invoking the rule that the public safety is the highest law.

That there is no necessity for the instant final decision is shown by the fact that the statute provides for detention of the tea for six months.

It cannot be contended that the law could not be

enforced if the importer were given a hearing or a day in court, for the reason that there is no haste required, and for the further reason that if there were danger that the action of the importer in demanding his day in court should be burdensome to the Government, it can be checked by affixing penalties in cases where the attempt to import is adjudicated illegal.

Hence we contend that this summary proceeding is not appropriate to the end aimed at by the law.

The custom of legislation does not furnish precedent for the extension of summary process to this case.

The food laws of the United States and similar statutes usually provide for a process to forfeit the condemned articles, or require action in court to compel the offending party to comply with the law, giving him his day in court.

THE ALIEN EXCLUSION ACT DECISIONS ARE NOT PRECEDENTS FOR APPLYING SUMMARY PROCESS, UNDER THE POWER TO REGULATE COMMERCE.

The principle upon which they stand is, that the alien seeking admission is not exercising a right, but merely asking for a privilege, and that Congress, under its power to regulate commerce, can affix as a condition to granting the privilege, that the alien appear, on examination by an administrative officer, not to belong to the classes excluded.

Ekiu *v.* U. S. (142 U. S., 651) seems to be the first case in which the question of due process as to aliens was directly discussed and decided. In prior cases the constitutionality on this point had not been questioned, but assumed.

The Court says:

> "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions and to admit them only in such cases and upon such conditions as it may see fit to prescribe. * * *
>
> "*As to such persons*, the decisions of executive or administrative officers acting within powers expressly conferred by Congress are due process of law,"
>
> Citing Murray *v.* Hoboken Land & Imp. Co., 59 U. S., 272;
>
> Hilton *v.* Merritt, 110 U. S., 97;

these being cases of the summary powers for collection of customs.

To say that the nation has power, as essential to self preservation, to admit aliens only upon such conditions as it may see fit to prescribe, and then to say that the alien who has only a *privilege* to ask to enter and not a *right*, may demand as a right that the question of his compliance with the condition be litigated, is palpably unreasonable. It is not pretended that a citizen of the United States could

be compelled to submit the final determination of his citizenship to an immigration officer.

To make the case of the importer parallel, it would be necessary to say that he is to be allowed to import goods only on condition that he waive his right to due process of law. This would be to make the constitutional limitation upon the power of Congress to regulate commerce, to wit, that it must be, according to the constitution, a nullity.

To go further back, the doctrine would permit Congress to say, "We cannot delegate legislative power to regulate commerce to the Secretary of the Treasury, but we can pass a law that you shall not engage in commerce unless you waive your right to object to such delegation."

THE DENIAL OF THE RIGHT TO QUESTION THE LEGALITY OF THE STANDARDS WHEN FIXED, IS DENIAL OF DUE PROCESS.

Even an alien can, by *habeas corpus*, have his day in court on the question whether a treasury regulation excluding him is authorized by the statute.

In re Kornmehl, 87 Fed. Rep., 314, LACOMBE, *J.*, says:

> "This instruction" (regulation under which the alien was excluded) "seems to be wholly unwarranted by any provision of the statute, at least such examination of them as this Court has been able to give fails to disclose any phraseology which can be construed as leav-

> ing the exclusion of immigrants to the mere arbitrary discretion of the Secretary of the Treasury,"

and he reverses the decision of the Treasury Department.

In *Ekiu* v. *U. S.*, it is said:

> "An alien is doubtless entitled to a right of *habeas corpus* to ascertain whether the restraint is lawful."

Now, by the device of empowering the Secretary to fix standards, all right to question their legality is practically cut off. Assume that the law can be so strained as to be construed to admit all teas which can claim to be pure and wholesome, what ground is there for us to question in court whether the samples furnished by the Secretary speak that law or not? The law says, they are the standards, and the decision of the Examiner is not on the mere question of whether the teas are pure or wholesome, but whether they are inferior to the standards. Therefore, no Court could overrule the Secretary's standards as it might illegal regulations, because in doing so, it would have to contradict the statute and pronounce them not to be standards when the statute says they are standards.

In *Butfield v. Bidwell*, the correctness of this was practically demonstrated.

The importer attempted to say that as the Secretary had included quality in his standard, it was not a legal standard. The Court held, in effect, that the practical nature of the samples precluded the question.

Although the intent of the statute might be that the result should be the exclusion only of teas not pure and wholesome, and therefore sanitary, the power of the Secretary to select standards, without limiting the standards by a law expressed in language, prevents the comparison of the standards with a law expressed in language, and thus emancipates them from any limitation of legality.

X.

Can a statute be made to depend for its whole force upon the physical properties of a specific package of tea.

We have never heard of any precedent for so doing. A law is a rule of action. Tea is a perishable commodity, liable to be changed by the effect of the elements, and by the greater or less care in drawing samples; it is also liable to be absolutely destroyed and leave no trace of itself. It is also exposed to the danger of fraudulent substitution. Being thus perishable and changeable in its nature and being the only law, there being no expression of the statute in language by which its legality can be tested, can it be said there is a law at all?

Measures of extension, weight and cubic capacity all rest upon the laws of nature. It is always possi-

ble to say conclusively whether or not a standard pound weight weighs a pound. It is logically impossible to say whether a case of tea expresses to-day what it did yesterday, or that it will express to-morrow what it does to-day.

We do not contend that a regulation that the Secretary of the Treasury, under the power to make regulations, might not use samples for the purpose of illustrating an expressed law; only that they cannot be made the law.

An extreme illustration of the unreasonableness of attempting to make the accidents of a physical substance a law is illustratsd by supposing that icicles should be set as a measure of dimension.

The naturally variable character of the law appears when we consider that the design is to give the importer samples of the teas which the Secretary has made the law. These he has to send to China or Japan as specimens to which his manufacture, or his selection of purchases is to conform. Months must necessarily elapse before his invoice can arrive here. In the meantime, it is apparent from the perishable nature of tea that it is at least within the bounds of possibility that the standards shall have materially changed so as to speak a different rule from what they did when they were selected.

The conclusion of which is, that logically the cases of tea which the Secretary makes to be the law are no law, and that the action of the Collector in detaining or destroying the tea is without due process of law, for the reason that there is no law.

XI.

If the power to make quality a part of the standard is unconstitutional, the whole act must fall.

It has been suggested that as the bill does not state the specific grounds on which the tea was rejected, we suppose the word "quality" to be unconstitutional, and "purity and fitness for consumption" without it to be legal, and that on this supposition the bill does not raise the question of constitutionality.

In reply to this we say:

1st. The bill does raise the question by the allegation that defendant intends and threatens to enforce the acts against our future imports, and so destroy our right to import. This equity was directly recognized in *Scott vs. McDonald.*

2nd. If "quality" is a matter of legislation, then the whole statute must fall.

Warren *v.* Charleston, 2 Gray, 84.

Shaw, *C. J.*, says:

> "If the parts are so mutually connected with, and dependent upon each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the Legislature would not pass the residue independently, the whole law is unconstitutional."
>
> Allen *v.* Louisiana, 103 U. S., 80.

Waite, *Ch., J.*:

> "The point to be determined in all such cases is, whether the unconstitutional pro-

> visions are so connected with the general scope of the law as to make it impossible to give effect to what appears to have been the intent of the Legislature, if those provisions are stricken out."

That the word "quality" is so interwoven with the words "purity and fitness for consumption," and the standards provided are not three standards, one of each of these characteristics, but a composite standard, appears from the language used by the Circuit Court of Appeals in Buttfield *v.* Bidwell:

> "The amendment evinces the intention of the Senate to authorize the adoption of uniform standards by the Secretary of the Treasury, which would be adequate to exclude the lowest grades of teas, whether demonstrably of inferior purity or unfit for consumption, or presumably or possibly so because of their inferior quality."

It is apparent that each of these characteristics bears some relation to the other, and that the intent of Congress was, that the standards should be a result selected with a regard to the effect of each upon the other.

Again, the fact that the Act of 1883 dealt with purity and fitness for consumption goes to show that Congress would not have changed the law if it were not in order to introduce quality, and would not have given the Secretary of the Treasury the discretion which the standards give him, were it not that the regulation of quality was necessary for this purpose.

IN CONCLUSION.

It is apparent that this acts giving power to the Secretary to regulate the quality of tea, was passed under the impression that it was merely a health act, though the intent of its framers was to empower a committee of merchants to have almost unlimited power over their fellow importers. The arbitrary power given to such obscure officers as examiners, to save or destroy a vast amount of goods, was given under the impression that it was nothing different from the arbitrary power necessarily committed to revenue officers to ascertain the amount of taxes to be paid, and the provisions of the Constitution have been thus unconsciously transgressed by the action of Congress. While strained constructions may be put upon the statute in the endeavor to bring it within limits which would be constitutional, it cannot be denied that the actual practical construction and administration of the act must necessarily be in violation of those principles.

To sanction it as proper legislation presents the serious question whether the principle is to be adopted that the purity, quality, and fitness for consumption, or analogous characteristics, of all merchandise imported into the United States, may be left to the control of an administrative officer who, according to the principle, may be either the Secretary of the Treasury or the Collector of the Port.

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Of Counsel for Appellant.

APPENDIX.

AN ACT To prevent the importation of impure and unwholesome tea.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this Act, and the importation of all such merchandise is hereby prohibited.

SEC. 2. That immediately after the passage of this Act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the person so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to and from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged

upon the duty herein provided, shall he paid out of the appropriation for "expenses of collecting the revenue from customs."

SEC. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of allk inds of teas imported into the United States, and shall procure and deposit in the custom houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

SEC. 4. That on making entry at the custom house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true quality of each and every part of the invoice and accord with the specifications therein contained; or, in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him

with the standards established by this Act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however*, That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this Act.

SEC. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no reexamination shall be demanded by the collector as provided in section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom-house, unless on a reexamination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted

for that portion and the remainder held for further examination, as provided in section six.

SEC. 6. That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reexamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

SEC. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purpose samples of the merchandise, obtained in the manner prescribed by section four of this Act, shall be forwarded to the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reexamination of teas, or merchandise described as tea, by examiners or boards of United States gen-

eral appraisers under the provisions of this Act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

SEC. 8. That in cases of re-examination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples and the papers therewith to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

SEC. 9. That noi imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this Act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

SEC. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this Act by appropriate regulations.

SEC. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this Act shall not be subject to the prohibition hereof, but the provisions of the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

SEC. 12. That the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this Act goes into effect.

Approved March 2, 1897.